TELEKOM MALAYSIA BHD

v.

TRIBUNAL TUNTUTAN PENGGUNA & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[JUDICIAL REVIEW APPLICATION NO: MT1-13-1-2005]
29 NOVEMBER 2006

ADMINISTRATIVE LAW: *Remedies - Certiorari - Consumer Claims Tribunal - Jurisdiction - Hearing of dispute arising from telecommunications industry - Whether beyond jurisdiction of Tribunal - Award by Tribunal - Whether ultra vires - Consumer Protection Act 1999, s. 2(2)(g) - Communications and Multimedia Act 1998, ss. 6, 188, 190*

STATUTORY INTERPRETATION: *Consumer Protection Act 1999 - Section 2(2)(g) - Scope of application - Whether excluding application of Act to trade transactions effected through communication of electronically transmitted waves*

WORDS & PHRASES: *"Communications" - Meaning - Section 6, Communications and Multimedia Act 1998*

The second respondent had disputed the applicant's two bills of RM98 each pertaining to the use of telecommunication services provided by the latter. Before the first respondent Tribunal (established under the Consumer Protection Act 1999 ('the CPA')), the second respondent argued that he had not made the international calls in question and that the calls were generated by the Internet Services without his consent. Subscribing to the argument, the Tribunal allowed the claim, ruling that there was wire-tapping of the communications services by an unidentified person who made the international calls while the second respondent was surfing the Internet. The applicant contended that the awards were *ultra vires* as the Tribunal had no jurisdiction to hear the dispute, and in the circumstances applied for an order of *certiorari* to quash the same. According to the applicant, the service of telecommunications provided by them involved electromagnetic waves to which the CPA had no application by virtue of its s. 2(2)(g). It was further argued, as a matter of law,

A that the trade transaction herein must come within the domains of the Communications and Multimedia Act 1998 ('the CMA'), and not the CPA.

Held (allowing *certiorari*):

B **(1)** By s. 2(2)(g) of the CPA, the Act shall not apply "to any trade transactions effected by electronic means unless otherwise prescribed by the Minister". As there was no submission that the Minister has prescribed any trade transactions under this section, the question before the court C is whether the disputed transaction between the parties came within the ambit of the first limb of s. 2(2)(g). (paras 17 & 18)

(2) Section 6 of the CMA defines "communications" as any D communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms. The definition is thus wide enough to cover telecommunication, although the word E "telecommunication" has not been defined in the CMA. In the circumstances, the ordinary dictionary meaning of that word, namely that "telecommunication" means "the science of communication of electronically transmitted waves of radio, radar, telephone, telegraph and the like", must apply. F (paras 21 & 22)

(2a) Bearing in mind the dictionary meaning of "telecommunication", and the statutory definition of the word "communications" in s. 6 of the CMA 1998, there is no doubt that s. 2(2)(g) of G the CPA has effectively excluded the application of that Act to trade transactions effected through the communication of electronically transmitted waves such as telephone. (para 23)

(3) The matter of consumer protection in the telecommunication industry is to be found in s. 188(1)(a) & (b) and s. 190(1)(b) H of the CMA. It follows that the dispute was outside the jurisdiction of the Tribunal, and the respondent, in bringing the same to the Tribunal, had obviously elected the wrong forum. (paras 24, 25 & 28)

I *[Awards of Tribunal ultra vires and quashed.]*

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Lim Siew Hong v. Contraves Advances Devices Sdn Bhd & Anor [2006] 2 AMR 770 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 749 CA ***(refd)***

Legislation referred to:

Communications and Multimedia Act 1998, ss. 6, 188(1)(a), (b), 190(1)(b)

Consumer Protection Act 1999, ss. 2(2)(g), 85

Rules of the High Court 1980, O. 53

For the applicant - Vicknaraj Thanarajah (Munawirah Mohamad with him); M/s Abdul Rahman Saad & Assoc

For the 1st respondent - Suzana Atan

Tan Boon Kheng in person

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Application

[1] Before me are two substantive notices of motion filed respectively by the applicants for the purpose of seeking judicial review by way of *certiorari* under O. 53 of the Rules of the High Court 1980 to quash the awards handed down by the first respondent, the Consumer Claims Tribunal ("the tribunal") on 25 January 2005.

[2] The applicants relied on the common ground *inter alia* that the awards are beyond the tribunal's jurisdiction and therefore *ultra vires.*

[3] Although the value of the subject matter is in the miniscule sum of RM98 in each application, the issue raised for my consideration is of immense importance and far-reaching implications. It concerns public interest and affects every spectrum of the telecommunication consumers nationwide.

Factual Background

[4] The facts in both the applications are substantially similar and so a reference to the second respondent herein is a reference respectively to the second respondent in both the applications.

[5] The tribunal was established under s. 85 of the Consumer Protection Act 1999 ("the CPA 1999") for the purpose of hearing claims for any loss suffered on any matter concerning the consumer's interest. The jurisdiction of the tribunal is subject to certain limitations prescribed under the CPA 1999.

[6] The matter before the tribunal originated from two RM98 bills delivered by the applicant to the second respondent respectively in relation to international calls said to be made by the second respondent to Papua New Guinea.

[7] The second respondent disputed the bill and filed a claim with the tribunal on the ground that the second respondent had not made the international calls, but had only used the Internet Service, and that an international call was generated by the Internet Service without his consent.

[8] The applicant at the direction of the tribunal launched a comprehensive investigation and produced a report which basically illustrated that the telecommunication lines and the telecommunication boxes connected to the second respondent's telephone were in good working order.

[9] The applicant also investigated the Internet Service Provider, TMNET Sdn Bhd which is a legal entity separate and distinct from the applicant, and which provides a different service to the second respondent as a subscriber specifically for a "dial-up Internet connection" ie, the TMNET 1515 service.

[10] The report and the bills of both the Internet Service Provider and the Telecommunications Service Provider showed that at the time the calls were charged, the second respondent was accessing the internet when a dialer downloaded to the

second respondent's computer which resulted in the making of international calls. The second respondent did not dispute the existence of these Internet and Telecommunications services.

[11] The tribunal found in favour of the second respondent on grounds of wire-tapping from an unidentified person who had made the international calls while the second respondent was surfing the internet and the second respondent's computer was hacked.

Governing Principles

[12] At this juncture, it is appropriate for me to set out the principles governing the grounds for sustaining a substantive notice of motion to challenge a decision-making process by way of *certiorari*, as follows:

(1) It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the tribunal to see if there are errors of law on the face of the record;

(2) It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed;

and an error may be disclosed if the decision-maker eg:

(a) asks himself the wrong question;

(b) takes into account irrelevant considerations;

(c) omits to take into account certain relevant considerations (an Anisminic error);

(d) misconstrues the terms of the relevant statute; or

(e) misapplies or misstates a principle of general law.

(per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 749 at p 765 f-g CA);

(3) In process or substance, an impugned decision is flawed on ground of:

A (a) illegality, meaning that the decision must be based on law and the decision-maker must understand directly the law that regulates his decision-making power and must give effect to it, and whether he has or not is par excellence a justiciable question;

B (b) irrationality meaning "Wednesbury unreasonableness", so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at C it, as enunciated in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223;

(c) procedural impropriety covering failure:

(i) to observe basic rules of natural justice;

D (ii) to act with procedural fairness;

(iii) to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is E conferred, even where such failure does not involve any denial of natural justice; and

(4) possibly, proportionality.

(per Edgar Joseph Jr FCJ in *R Rama Chandran v. Industrial* F *Court of Malaysia & Anor*. [1997] 1 CLJ 147 at pp 172b-173b; referring to the judgment of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374.)

G (See my judgment in *Lim Siew Hong v. Contraves Advances Devices Sdn Bhd & Anor* [2006] 2 AMR 770 at pp 773-775).

Jurisdictional Error

[13] The ground relied on by the applicant relates to jurisdictional H error which is a specific ground within the ambit of the broader doctrine of error of law on the face of the record, as enunciated in principle (1) above.

[14] It was submitted by Mr. Vicknaraj Thanarajah (assisted by I Ms Munawirah bt Mohamad) that the CPA 1999 does not apply to any trade transaction effected by electronic means unless otherwise prescribed by the Minister. They added that the service

of telecommunications provided by the applicant involves electromagnetic waves to which the CPA 1999 has no application by virtue of s. 2(2)(g) thereof, but comes within the provisions of the Communications and Multimedia Act 1998 ("the CMA 1998").

[15] Learned senior federal counsel Ms Suzana bt Atan appeared for the first respondent on 5 December 2005 and requested for time to reply to the issue raised under s. 2(2)(g). She was given time to file written submission on or before 6 February 2006. However no such submission has been presented for the tribunal.

[16] The second respondent appeared as a lay person and so did not submit.

[17] In my judgment, the relevant portion of s. 2 of the CPA 1999 merits reproduction as follows:

Section 2. Application

(1) Subject to subsection (2), this Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade.

(2) This Act shall not apply:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) to any trade transactions effected by electronic means unless otherwise prescribed by the Minister.

(3) Notwithstanding subsections (1) and (2), this Act shall apply to any matter prescribed under section 103.

(4) The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

[18] As there was no submission that the Minister has prescribed any trade transactions under s. 2(2)(g), the question before me is whether the disputed transaction between the applicant and the second respondent comes within the ambit of the first limb to s. 2(2)(g).

[19] As alluded to above, there is apparently no dispute that the applicant provides and the second respondent receives telecommunication services.

[20] The long title to the CMA 1998 says that it is an Act to provide for and to regulate the converging communication and multimedia industries and for incidental matters. It has repealed the traditional Telecommunications Act 1950 and the Broadcasting Act 1988.

[21] Section 6 of the CMA 1998 defines "communications" as any communication, whether between persons and persons, things and things, or persons and things, in the form of sound, data, text, visual images, signals or any other form or any combination of those forms. In my view, this definition in s. 6 is wide enough to cover telecommunications, although the word "telecommunications" has not been defined in the CMA 1998.

[22] In the circumstances, the ordinary dictionary meaning of that word shall apply. According to the Lexicon Webster Dictionary Vol II, "telecommunication" is the science of communication of electronically transmitted waves of radio, radar, telephone, telegraph and the like.

[23] In view of the above dictionary meaning of "telecommunication", and also the statutory definition of the word "communications" in s. 6 of the CMA 1998, I have no doubt that s. 2(2)(g) of the CPA 1999 has effectively excluded the application of the CPA 1999 to trade transactions effected through the communication of electronically transmitted waves eg, telephone.

[24] Consumer protection in the telecommunication industry is to be found in s. 188(1)(a) and (b) and s. 190(1)(b) of the CMA 1998 in the following words:

188(1) Any network facilities provider, network service provider, applications service provider or content applications service provider shall:

(a) deal reasonably with consumers; and

(b) adequately address consumer complaints.

190(1) Consumer code prepared by a consumer forum or the Commission shall include model procedures for:

(a) ...;

(b) the handling of customer complaints and disputes including an inexpensive arbitration process other than a court, and procedures for the compensation of customers in case of a breach of a consumer code; and/or

(c) ...

[25] While the CMA 1998 was clearly enacted to, *inter alia*, provide for consumer protection in the telecommunications industry, the CPA 1999 is not intended to apply to the hearing of a dispute arising from the same industry.

[26] It appears obvious to me that the second respondent had elected the wrong forum to bring the dispute to the tribunal as it is outside the jurisdiction of the tribunal.

[27] The second respondent has a choice of suing in a civil Court of Law or alternatively lodge a complaint under s. 188(1)(a) and (b) and s. 190(1)(b) of the CMA 1998 for a resolution of the dispute and to get redress if any.

Conclusion

[28] As the award was made by the tribunal in respect of a subject matter beyond its jurisdiction and *ultra vires*, it is not legally sustainable, with the result that it is hereby quashed by way of *certiorari*.

[29] On the facts of this case, I make no order as to costs.